



A Little Good Fortune Goes a Long Way

The legal challenges of prospective change orders

BY MICHAEL F. YOSHIBA, ESQ.

The recently completed Agoura Road Widening Project was an ambitious undertaking by the City of Agoura Hills in California. The \$24.5 million project covered just over two miles and included the addition of two travel lanes, a roadway and pedestrian bridge widening, landscaped medians, improved lighting and traffic signalization, utility undergrounding, bicycles lanes and meandering sidewalks for weekend joggers and pedestrians. This project, as with all public works projects, encountered unexpected obstacles.

The Planning and Design Phase

The Agoura Road Widening Project was planned and designed over the course of several years. More than seven different utility services were identified as being

impacted by this project, including the storm drain system where water flows from public and private property into the County storm drain system.

The project included a small easement acquisition from an undeveloped private property. However, during the acquisition phase, no one was aware that property was in the initial stages of development. There were plans underway to construct a commercial building, along with associated amenities. Since a storm drain connection would be required for this property, and this was not included in the original contract, a contract change order would be needed.

This is where the issue arose. For the Agoura Widening Project, the City

insisted that all of the required tasks be performed under the construction contract. The contractor disagreed and was prepared to claim a work change order to increase their compensation for this unforeseen addition.

Acquisition of Property Rights

The partial piece of property needed was appraised and an offer of just compensation was made to the property owner, including the installation of a driveway at a location selected by the property owner. The City included this in the offer because the property owner had previously submitted a draft site plan for a pre-development review, which identified the location of a driveway access to the property and the locations where the property would seek utility connections.

The City and property owner eventually agreed to the following:

- (1) Monetary compensation.
- (2) The City would construct a driveway pad in an agreed location along the realigned Agoura Road.
- (3) The parties agreed that at a specific location, the City would allow for the property to connect their storm drain utility stub to the county's storm drain system.
- (4) The City agreed that they would notify the owner in advance of the installation of the new relocated storm drain pipes in the City's roadway.

Handling Potential Change Orders

Construction proceeded as planned until the City notified the property owner that they needed to provide a copy of the approved utility connection permit from the County. Storm drain connections to the County system are obtained through a permit application



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process and generally require the submission of appropriate design and construction plans that clearly identify the proposed connections. To the City's surprise, the property owner had not even submitted a permit application. The owner incorrectly assumed that they could bypass the County's permit application process because it was a City project.

In the meantime, the contractor submitted their project schedule, which only allocated a few days for the completion of the private property utility. If the property did not have the appropriate connection permits, the contractor would either complete the project without the connection or submit a change order to get paid for project delays until the property could obtain the permit. Although the

property owner was not in the right, a lawsuit against the City was the likely result if this situation was not resolved.

In a stroke of luck, several weeks of inclement weather delayed the construction project. It just so happened that the City's contract included a provision for minimal compensation for project delays caused by weather conditions. The property owner (with an assist from the City) was able to expedite a permit application to the County, which was reviewed and issued, and the storm drain connection was made. In the end—and because of the bad weather contract clause—there was only a minor contract change order paid to the contractor. This is one of those instances where Mother Nature delivers a little good fortune. ☘

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